



## 46 CFR Part 540

[Docket No. 20-15]

RIN: 3072-AC82

### Passenger Vessel Financial Responsibility

**AGENCY:** Federal Maritime Commission.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The Federal Maritime Commission (Commission) is issuing this NPRM to seek comment on potential regulatory changes to its passenger vessel operator financial responsibility requirements. The Commission is proposing to define when nonperformance of transportation has occurred and to establish uniform procedures regarding how and when passengers may make claims for refunds under a passenger vessel operator's financial responsibility instrument when nonperformance occurs. This rulemaking resulted from recommendations in an Interim Report issued by the Fact Finding Officer in Commission Fact Finding Investigation No. 30: COVID-19 Impact on Cruise Industry.

**DATES:** Submit comments on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may submit comments, identified by Docket No. 20-15, by the following methods:

- *Email:* [secretary@fmc.gov](mailto:secretary@fmc.gov). For comments, include in the subject line: "Docket No. 20-15, Comments on PVO Financial Responsibility Rulemaking." Comments should be attached to the email as a Microsoft Word or text-searchable PDF document.

*Instructions:* For detailed instructions on submitting comments, including requesting confidential treatment of comments, and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document.

Note that all comments received will be posted without change to the Commission's website, unless the commenter has requested confidential treatment.

*Docket:* For access to the docket to read background documents or comments received, go to the Commission's Electronic Reading Room at:

<https://www2.fmc.gov/readingroom/proceeding/20-15/>.

**FOR FURTHER INFORMATION CONTACT:** Rachel E. Dickon, Secretary; Phone: (202) 523-5725; Email: [secretary@fmc.gov](mailto:secretary@fmc.gov).

## **SUPPLEMENTARY INFORMATION:**

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## **I. INTRODUCTION**

On October 29, 2020, the Federal Maritime Commission (Commission) issued an Advance Notice of Proposed Rulemaking<sup>1</sup> (ANPRM) to obtain comments on potential regulatory

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<sup>1</sup> Docket No. 20-15, *Passenger Vessel Financial Responsibility*, 85 FR 65020 (October 29, 2020).

changes recommended in the Fact Finding 30 Interim Report on passenger vessel operator (PVO) refund policies.<sup>2</sup> The proposed changes are intended to provide a clear and consistent policy toward vessel passenger ticket refunds, from the PVOs' financial responsibility instruments filed with the Commission, in the case of nonperformance by the vessel operator. Specifically, the Commission recommended modifying regulations in 46 CFR part 540 to 1) adopt a definition of nonperformance of transportation, and 2) detail the process for obtaining refunds under the PVOs' financial responsibility instruments filed with the Commission. In response to the ANPRM, the Commission received four sets of comments from interested parties. These parties are Cruise Lines International Association (CLIA); Passenger Vessel Association (PVA); The Surety & Fidelity Association of America (SFAA); and Kacie Didier. Under this Notice of Proposed Rulemaking (NPRM), the Commission addresses the comments to the ANPRM and seeks further public comments on the proposed modifications to its regulations in part 540.

## **II. BACKGROUND**

On November 6, 1966, Congress enacted Public Law 89-777. Section 2 of the statute (codified at 46 U.S.C. 44103) requires owners and charterers of vessels having berth or stateroom accommodations for 50 or more passengers, and embarking passengers at United States ports, to establish financial responsibility to meet any liability incurred for death or injury to passengers or other persons on voyages to or from United States ports. Section 2 is commonly known as the "Casualty" section. Section 3 of the statute (codified at 46 U.S.C. 44102) requires persons arranging, offering, advertising, or providing transportation on such vessels to establish evidence of financial responsibility to indemnify passengers for nonperformance of the

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<sup>2</sup> Fact Finding Investigation No. 30: COVID-19 Impact on Cruise Industry, *Interim Report: Refund Policy*, at 11-13 (July 27, 2020) (Fact Finding 30 Interim Report or Interim Report).

transportation. Section 3 is commonly known as the “Performance” section. The Commission published implementing regulations at 46 CFR part 540 in 1967.<sup>3</sup>

Under this program, the Commission issues two types of certificates to PVOs of vessels that: (1) have berths for 50 or more passengers; and (2) embark passengers from U.S. ports. The first type of Certificate (Performance) is issued by the Commission when a PVO provides the Commission with acceptable evidence of coverage to satisfy liability incurred for nonperformance of transportation up to the amount of unearned passenger revenue (UPR) held by the PVO or the monetary cap set in the Commission’s regulation. Such coverage may be in the form of insurance, a guaranty, a surety bond, or escrow agreement (collectively referred to as financial responsibility instruments).<sup>4</sup> The coverage is used to reimburse passengers when the PVO fails to perform cruises as contracted and has taken no further actions to refund passengers.<sup>5</sup> The second type of Certificate (Casualty) is issued by the Commission when a PVO provides the Commission with acceptable evidence of coverage to satisfy any liability incurred for death or injury during a voyage, as provided in the regulations and statute.

There have been few changes to the regulations in part 540 since its inception. Changes have included several increases to the monetary cap for required performance coverage under section 44102, the elimination of the self-insurance option for PVOs, some limitations on the types of entities acceptable as guarantors, and the elimination of certain sliding-scale provisions as to the amount of coverage required. Most recently, the Commission increased the cap on required performance coverage in two annual steps, from \$15 million to \$22 million in 2014, and

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<sup>3</sup> 32 FR 3986 (Mar. 11, 1967) (establishing regulations governing nonperformance coverage); 32 FR 7282 (May 16, 1967) (establishing regulations governing casualty coverage).

<sup>4</sup> The Commission’s regulations also permit smaller PVOs to request to substitute alternative forms of financial protection as evidence of financial responsibility. *See* 46 CFR 540.9(l).

<sup>5</sup> In practice, passengers generally receive refunds for canceled cruises from the PVOs directly or, if the passenger paid by credit card, from the credit card issuer. Refund payments under the PVO financial responsibility instruments are rare and usually only occur if the PVO ceases operations or declares bankruptcy.

then from \$22 million to \$30 million in 2015.<sup>6</sup> Since 2015, the cap has been adjusted for inflation every two years based upon the U.S. Bureau of Labor Statistics' Consumer Price Index. The current cap is \$32 million.<sup>7</sup>

In March of 2020, following the arrival of COVID-19 in the U.S., the Centers for Disease Control and Prevention (CDC) issued a "No Sail Order and Suspension of Further Embarkation," (CDC No Sail Order) causing most PVOs to cease operations. As a consequence, questions arose concerning future cruises and passengers' ability to obtain refunds of monies paid for transportation disrupted by COVID-19. Fact Finding 30 was initiated on April 30, 2020, to investigate the impact of COVID-19 and identify commercial solutions to COVID-19 related issues that interfered with the operation of the cruise industry. The Fact Finding Officer issued an Interim Report on PVO Refund Policies on July 27, 2020, concluding that clearer guidance is needed in determining whether a passenger is entitled to obtain a refund if a PVO cancels a voyage, makes a significant schedule change, or significantly delays a voyage.<sup>8</sup> The Fact Finding Officer proposed recommending certain regulatory changes in order to provide a clear interpretation of nonperformance of transportation, and to modify the appropriate provisions of the Commission's PVO regulations to make clear how passengers may obtain refunds under the PVOs' financial responsibility instruments filed with the Commission. The Commission voted on August 10, 2020, to initiate a rulemaking to implement the recommended changes. The Advance Notice of Proposed Rulemaking (ANPRM) Docket No. 20-15 Passenger Vessel Financial Responsibility was published in the Federal Register on October 14, 2020, seeking

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<sup>6</sup> 46 CFR 540.9(j); Final Rule: Passenger Financial Responsibility Requirements for Nonperformance of Transportation, 78 FR 13268 (Feb. 27, 2013)

<sup>7</sup> Notice: Financial Responsibility for Indemnification of Passengers for Nonperformance of Transportation—Cap Adjustment, 84 FR 17410 (June 24, 2019). An increase of \$1 million (from \$32 million to \$33 million), based on the 2020 Consumer Price Index, is pending as of April 1, 2021.

<sup>8</sup> Fact Finding 30: Covid-19 Impact on Cruise Industry, *Interim Report: Refund Policy* (July 27, 2020).

comments on potential regulatory changes to implement the recommendations in the Interim Report.

### **III. ANPRM PROPOSED CHANGES AND SUMMARY OF COMMENTS**

The Fact Finding Officer proposed, among other things, that the Commission provide a clear interpretation of nonperformance of transportation and modify the appropriate provisions of the Commission's PVO regulations in part 540 to make clear how passengers may obtain refunds under the PVOs' financial instruments filed with the Commission. These recommendations were as follows:

Therefore, it is proposed that the Commission: (1) interpret "nonperformance of transportation" to include cancelling a sailing or delaying passenger boarding by twenty-four (24) hours or more; and (2) modify the appropriate provisions of the Commission's PVO regulations to make clear how passengers may obtain refunds under the PVOs' financial instruments:

1. When a sailing is cancelled or consumer boarding is delayed by twenty-four (24) hours or more for any reason other than due to a government order or declaration in paragraph 2 below, full refunds must be paid within sixty (60) days following a passenger refund request.
2. When a sailing is cancelled or consumer boarding is delayed by twenty-four (24) hours or more due to a governmental order or declaration, full refunds must be paid within one hundred eighty (180) days following a passenger refund request. This includes all consumers who, at their own discretion, cancelled their booking within sixty (60) days prior to said governmental action and commensurate cancelled or delayed sailing.
3. If, following a declaration of a public health emergency, any consumer cancels a cruise booking of a sailing that may be affected by such emergency after the PVO's refund deadline, but the sailing is not cancelled, the PVO will provide a credit for a future cruise equal to the consumer's amount of deposit. In all other cases in which a consumer cancels and embarkation and sailing occur within the prescribed timeline, the cruise line's rules for cancellation will apply.
4. A PVO may set a reasonable deadline for a consumer entitled to a refund to request the refund which shall not be less than 6 months after the scheduled voyage.
5. Refunds should include all fees paid to carrier by consumer to include all ancillary fees remitted to the carrier by the consumer.
6. Refunds to be given in same fashion as monies were originally remitted to the carrier. The PVO will be deemed to have made a refund payment if the deposited revenue as to a passenger requesting a refund is remitted by the PVO in the same manner as the passenger's original payment, by: (1) mailing a check payable in immediately available funds to the passenger at an address furnished by the

passenger, (2) issuing an electronic funds transfer, including wire transfer, automated clearinghouse (ACH) or other electronic means, in immediately available funds, or (3) posting of a credit to the credit card processor for the benefit of the credit card account used by passenger to make payments to the applicant. The refund will be deemed timely notwithstanding that passenger may not immediately have access to the transferred funds in its account or any credit card account due to rules and processes of any third-party services provider.

7. Nothing in this rulemaking shall be interpreted to preclude the consumer and the PVO from entering into an alternative form of compensation in full satisfaction of a required refund, such as a future cruise credit.<sup>9</sup>

The Fact Finding Officer also recommended the Commission mandate that: (1) PVOs provide on their websites clear instructions on how passengers may obtain refunds; and (2) PVOs submit current web addresses showing their refund instructions to the Commission for publication on the Commission's website.<sup>10</sup>

#### **A. Defining Nonperformance of Transportation**

As outlined in Section II above, 46 U.S.C. 44102 requires that PVOs file with the Commission evidence of financial responsibility to indemnify passenger for nonperformance of transportation. The Commission's regulations in 46 CFR part 540 do not expressly define what constitutes nonperformance of transportation, but the substantive provisions and required financial responsibility instrument terms indicate that it means the PVO's failure to provide transportation or other accommodations and services subject to part 540, subpart A,<sup>11</sup> in accordance with the terms of the ticket contract between the PVO and passenger.<sup>12</sup>

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<sup>9</sup> Fact Finding 30 Interim Report at 11-12.

<sup>10</sup> *Id.* at 12.

<sup>11</sup> The scope of the transportation, accommodations, and services covered is described in the definition of "unearned passenger revenue" in § 540.2 and includes water transportation and all other accommodations, services, and facilities relating thereto, but excludes air transportation, hotel accommodations, or tour excursions. 46 CFR 540.2(i).

<sup>12</sup> See 46 CFR 540.1(a) (stating that PVOs must file evidence of financial responsibility or a bond or other security for obligations under the terms of ticket contracts to indemnify passengers for nonperformance of transportation to which they would be entitled; Form FMC-132A to Subpart A of Part 540 (stating that: (1) the purpose of the bond is to ensure financial responsibility and the supplying of transportation and other services subject to Subpart A of part

As discussed in the ANPRM, the Commission sought comment on adopting a definition of nonperformance of transportation. The Commission anticipated that implementing this change would involve amending the regulations in part 540, subpart A, to include the definition and revising the language of the forms for financial responsibility instruments (surety bonds, guaranties, and escrow agreements) to reflect coverage in situations under the definition.<sup>13</sup> To that end, the Commission included in the ANPRM the following draft definition:

*Nonperformance of transportation* means: (1) canceling a voyage; or (2) delaying the boarding of passengers by more than twenty-four (24) hours if the passenger elects not to embark on the substitute or delayed voyage.

### **Summary of Comments**

#### ***Passenger Vessel Association (PVA)***

PVA maintains that the regulatory changes proposed in the ANPRM are outside the Commission's jurisdiction and believes that while the statutory provision at 46 U.S.C. 44102 imposes duties upon a covered PVO to file with the Commission evidence of financial responsibility to indemnify passengers for nonperformance of transport, it does not grant legal authority to the Commission to address the matter of what constitutes nonperformance. Nevertheless, PVA urges that if the Commission elects to go forward with the proposed rule, it should eliminate any reference to delayed sailing in its definition of nonperformance of transportation, and failing that, the time threshold should be a delay of at least 48 hours. PVA is concerned that the proposed definition of nonperformance could provide incentive for a PVO to begin a cruise despite potentially unsafe conditions, such as bad weather, in an effort to avoid a delay being deemed as nonperformance. PVA remarks that the proposal for a 24 hour delay to

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540, in accordance with the ticket contract between the PVO and the passenger; and (2) the scope of the surety's liability is for refunds due under ticket contracts made by the PVO for the supplying of transportation and other services).

<sup>13</sup> These forms include Form FMC-132A, Passenger Vessel Surety Bond (Performance); Form FMC-133A, Guaranty in Respect of Liability for Nonperformance, Section 3 of the Act; Appendix A, Example of Escrow Agreement for Use Under 46 CFR 540.5(b)). There is no required or optional form for insurance, which must meet the requirement in § 540.5(a).



constitute nonperformance appears to be based on a U.S. Department of Transportation policy regarding delays in scheduled commercial airline transportation and is not an appropriate standard to apply to a scheduled cruise.

***The Surety & Fidelity Association of America (SFAA)***

SFAA believes the proposed definition of nonperformance is “overly stringent and will increase the number of claims against this obligation, thereby increasing the likelihood of exposure under the surety bond.” SFAA further states that a standard of requiring refunds if boarding is delayed by 24 hours would add a significant burden to PVOs in terms of an increase in full refunds issued, as well as compliance costs to operationalize procedures to process refunds based on a 24-hour delay to the voyage. SFAA contends the 24-hour delay standard for nonperformance would increase “nuisance” claims against PVOs, which would impact how sureties underwrite the obligation. SFAA believes the proposed definition of nonperformance would cause sureties to require PVOs to have more cash on hand or larger lines of credit, and ultimately decrease the number of PVOs eligible to receive a surety bond. SFAA recommends changing the definition of nonperformance to a minimum of 72 hours.

SFAA also expresses concern over uncertainty about what is covered under the bond in response to a claim based on the new definition of nonperformance. Specifically, SFAA argues that a passenger’s unilateral cancellation should be excluded from coverage under the bond. SFAA also requests clarity as to what passenger expenses are covered as a result of PVO nonperformance.

**B. Process for Obtaining Refunds from PVO Instruments for Nonperformance of Transportation**

**1. General**

Although the Commission regulations require certain coverage and terms to be included in financial responsibility instruments, the regulations do not include uniform procedures regarding how and when passengers may make claims for refunds against the various financial responsibility instruments. The Fact Finding 30 Interim Report recommended that the

Commission revise its regulations to make clear how passengers may obtain refunds under these instruments and include specific provisions related to such claims and the timing of refund payments.<sup>14</sup>

Neither part 540 nor the financial responsibility instrument forms provide specific instructions on how or when passengers may obtain refunds under a PVO's financial responsibility instrument. For example, the Guaranty Form (Form FMC-133A) provides that Guarantor will make refund payments to passengers when: (1) the PVO and passenger enter into settlement agreement, approved by the Guarantor; or (2) the passenger obtains a final judgment against the PVO and the PVO does not make payment within 21 days. Similarly, the suggested language for Escrow Agreements in Appendix A states that an Escrow Agent will make refund payments to passengers when either: (1) the PVO provides written instructions to the Escrow Agent to make such payment; or (2) the passenger obtains a final judgment against the PVO, the PVO does not make payment within 21 days, and the Escrow Agent receives a certified copy of the court order.

The Fact Finding 30 Interim Report recommended and the ANPRM requested comments on the following general procedure: (1) the passenger makes a request for a refund from a PVO financial responsibility instrument when nonperformance has occurred; and (2) the refund payment is made within a certain period, depending on certain conditions.<sup>15</sup> The Commission anticipates that implementing these changes would involve amending the regulations in part 540, Subpart A and the language of the financial responsibility instruments forms to reflect the new procedure.

### **Summary of Comments**

#### ***Passenger Vessel Association (PVA)***

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<sup>14</sup> Fact Finding 30 Interim Report at 11-12.

<sup>15</sup> Fact Finding 30 Interim Report at 11-12.

PVA comments that while there is a business relationship between a PVO and its financial responsibility instrument provider, no comparable relationship exists between the provider and the cruise ship passenger. PVA believes the Commission should not attempt to create or force such a relationship. Instead, should the Commission go forward with establishing a process for a passenger to claim a refund for nonperformance of transportation, it should specify that the passenger must submit the refund claim directly to the PVO. The PVO would then be responsible to submit the claim to the financial responsibility instrument provider, if the PVO agrees that nonperformance of transportation has occurred and that satisfaction of a claim is warranted.

***The Surety & Fidelity Association of America (SFAA)***

SFAA “strongly believes” that the PVO should continue to serve as the primary party designated to receive and handle claims submitted by passengers. In a case of liquidation of the PVO, or if there is no response from the PVO, then claims could be submitted to the surety. SFAA maintains that sureties do not generally have the claims handling capability to process individual claims against the financial responsibility instrument. SFAA believes that implementing a system that allows a direct right of action against the surety bond without requiring a judgment will make claim handling more involved, expensive, and tedious. Further, SFAA asserts that if sureties are designated as the direct claims handling entity with an investigatory requirement under the new regulatory regime, many will likely exit the market. SFAA believes that the net effect of the proposed changes would increase the cost of a surety bond, or a lack of availability of surety bonds. SFAA recommends two alternative approaches to the proposed process:

- (1) Claims be submitted directly to the Federal Maritime Commission as the obligee and beneficiary of said surety bonds, and the FMC may then submit verified requests for payment to the sureties based on its review of the claim; or
- (2) Claimants be required to obtain adjudication of its claim before submitting their claims to the surety.

2. Deadline for Submitting Refund Requests under the Financial Instrument

Commission regulations do not currently prescribe how long passengers have after a scheduled voyage to seek a refund from a PVO financial responsibility instrument. The Fact Finding 30 Interim Report recommended that the Commission specify that a PVO may set a reasonable deadline for passenger refund requests, but the deadline may not be less than six months after the scheduled voyage.<sup>16</sup> The Commission included the following draft provision to reflect this recommendation:

A passenger must submit a request for refund no later than 180 days<sup>17</sup> after nonperformance occurs unless the ticket contract or other passenger vessel operator policy allows a longer period of time for such requests.

The Commission could include this provision in part 540 and require that the financial responsibility instrument specify the time period for passengers to file refund requests.

### **Summary of Comments**

No comments were received which specifically address the submission of refund requests.

### **3. Deadline for Refund Payment under the Financial Instrument**

Commission regulations do not currently specify a time period within which passengers must receive a refund under a PVO financial responsibility instrument. The Fact Finding 30 Interim Report recommended that the Commission specify two different timeframes for payment depending on whether nonperformance was due to “a governmental order or declaration”: (1) when nonperformance is due to a governmental order or declaration, full refund payments must be made within 180 days after the passenger requests a refund; and (2) in all other cases, full refund payments must be made within 60 days after the passenger requests a refund.<sup>18</sup> The Interim Report also recommended that a refund payment be deemed timely notwithstanding that

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<sup>16</sup> Fact Finding 30 Interim Report at 12.

<sup>17</sup> For clarity and ease of calculation, the Commission contemplates using a deadline of 180 days rather than six months.

<sup>18</sup> Fact Finding Interim Report at 11.

the passenger may not immediately have access to the funds due to the rules and processes of any third party services provider.<sup>19</sup>

The Commission requested comment on prescribing a deadline for payment of refunds from financial responsibility instruments providers as a general matter. The ANPRM proposed two different timeframes for payment depending on whether nonperformance is due to a governmental order or declaration, and the ANPRM adopted the deadlines recommended in the Interim Report (180 days when there is a governmental order or declaration; 60 days in all other cases).

### **Summary of Comments**

#### ***Passenger Vessel Association (PVA)***

It is PVA's position that the Commission's proposed bifurcated time frame for refunds, which varies depending on the reason for the cancellation, is potentially confusing and unfair. PVA poses the question of how the regulation would be applied in the case of a governmental order to cancel sailings that applies to some PVOs that are regulated by the Commission, but not all. PVA states that in such a case, smaller PVOs, that may not be subject to a No Sail Order but that voluntarily choose to cancel a cruise in the interest of passenger and crew health and safety, would have to provide requested refunds in a shorter time period than larger PVOs. PVA believes this is an unfair policy distinction and recommends that a period of payment of the refund be no more than 180 days after the customer's claim is submitted, no matter the reason for the nonperformance of transportation.

Should the Commission choose to retain a specific refund process in the event of nonperformance due to a governmental order or declaration, PVA maintains that it should be "very precise" as to what triggers this process. PVA believes that, as a general rule, states, counties, and municipalities have no or very limited authority over vessel safety and navigation.

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<sup>19</sup> *Id.* at 12.

PVA therefore recommends that only orders and declarations from federal agencies with “clear maritime authority” be specified as the triggering events for the refund process.

#### 4. Form of Refund Payment under the Financial Instrument

Commission regulations do not specify in what form refund payments must be made under PVO financial responsibility instruments.

The Fact Finding 30 Interim Report recommended the Commission specify that refund payments must be made in the same manner as the passenger’s original payment, e.g., check, electronic funds transfer, or credit card chargeback.<sup>20</sup> The ANPRM requested comments on the recommendation.

#### **Summary of Comments**

No comments were received which specifically address the form of refunds. However, it is the Commission’s experience that financial instrument providers will not likely be able to provide refunds in the same manner as the passenger’s original payment. The Commission understands refunds provided by financial instruments are typically in the form of checks that are mailed to the passenger.

#### 5. Defining Unearned Passenger Revenue

Commission regulations provide that the PVO financial responsibility instruments must provide coverage for “unearned passenger revenue,” which is defined as passenger revenue received for water transportation and all other accommodations, services, and facilities relating thereto not yet performed; this includes port fees and taxes paid, but excludes such items as airfare, hotel accommodations, and tour excursions.<sup>21</sup>

The Fact Finding 30 Interim Report recommended the Commission specify that refund payments must include all fees, including ancillary fees, paid to the PVO by the passenger. The Commission requested comment on whether to expand the definition of unearned passenger

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<sup>20</sup> Fact Finding 30 Interim Report at 11-12.

<sup>21</sup> 46 CFR 540.2(i).

revenue and the scope of the ancillary fees to be included in any revised definition. The Fact Finding 30 Interim Report discusses the following types of ancillary charges paid by passengers to PVOs prior to sailing: gratuities, shore excursions, pre-cruise onboard purchases, port fees, and taxes. Of these, the current definition of unearned passenger revenue expressly includes port fees and taxes and excludes excursions. The Interim Report does not discuss refunds for airfare or hotel accommodation.

To facilitate comment, the Commission included the following draft definition in the ANPRM:

*Unearned passenger revenue* means that passenger revenue received for water transportation and all other related accommodations, services, and facilities relating thereto not yet performed; this includes port fees, taxes, and all ancillary fees remitted to the passenger vessel operator by the passenger.

### **Summary of Comments**

#### ***Cruise Lines International Association (CLIA)***

CLIA urges the Commission to clarify that “unearned passenger revenue” (UPR) should include cruise passage fare and related cruise lines goods and services amounts collected by the cruise line, such as port charges and taxes, pre-paid on-board purchases, gratuities, and shore excursions at the cruise line’s own or affiliated destinations. CLIA argues that UPR should not include deposits for airfare, non-affiliated shore excursions or other third party provider costs for which the cruise line is not still holding the passenger’s deposit or is contractually obligated to pay such deposit to a third-party provider.

CLIA maintains that if a cruise line contracts with an airline, shore hotel resort, attraction or other unaffiliated “arm’s length” third party services provider, the cruise line would be acting as an agent for the passenger in booking such accommodations or activities for the passenger’s benefit.

If the cruise line has not yet paid or contractually committed any passenger deposits for such items to the third-party provider, the cruise line may refund them to the passenger.

However, if these funds have been paid or contractually committed to such third-party providers,

the cruise line will have paid, or will have to pay, those funds to the third-party provider on behalf of the passengers. CLIA states that passengers may be entitled to seek funds directly from such third parties. CLIA believes that statutory law and current Commission regulations support its interpretation that UPR is limited to the passenger vessel transportation only and does not extend to other goods and services for which passengers may make advance payments to the cruise line. CLIA also notes that most cruise passengers are offered cancellation insurance arrangements, or other means of protecting such third-party refunds, at time of booking.

#### 6. Publishing Information on How to Obtain Refunds

The Fact Finding 30 Interim Report recommended the Commission mandate that: (1) PVOs provide on their websites clear instructions on how passengers may obtain refunds; and (2) PVOs submit current website addresses for their refund instructions to the Commission for publication on the Commission's website.<sup>22</sup> The ANPRM envisioned that this recommendation could be implemented by: (1) revising the Form FMC-131, Application for Certificate of Financial Responsibility, to require PVOs to provide the uniform resource locator (URL) for their refund instructions; and (2) amending § 540.4 to require PVOs to amend their application if the URL changes. The Commission requested comment on this potential change.

#### **C. Passenger Cancellations**

In addition to recommendations related to passenger refunds in the event of nonperformance of transportation, the Fact Finding 30 Interim Report also proposed that the Commission amend its regulations to ensure PVO financial responsibility in the event passengers cancel their booking with a PVO prior to or following certain governmental orders or declarations. Specifically, the Fact Finding 30 Interim Report recommended that: (1) a passenger be entitled to a refund if they cancel their booking no more than 60 days prior to a governmental order or declaration that results in the PVO canceling the voyage or delaying boarding of passengers by more than 24 hours; and (2) a passenger be entitled to a future cruise credit if they

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<sup>22</sup> Fact Finding 30 Interim Report at 12.



cancel their booking following the declaration of a public health emergency and the voyage occurs as scheduled.

The ANPRM requested comments on the recommendation regarding passenger refunds when the passenger cancels their booking, and the voyage is subsequently canceled as a result of governmental orders or declarations.

The ANPRM also requested comments on the recommendation regarding the provision of future cruise credit when the passenger cancels their booking following declaration of a public health emergency, but the voyage occurs as scheduled.

### **Summary of Comments**

#### ***Cruise Lines International Association (CLIA)***

CLIA commented on the provision of the proposed rule which entitles passengers to a full refund when the passenger themselves canceled their booking within 60 days prior to a governmental order or declaration and the commensurate cancelled or delayed sailing (so-called “lookback” refunds). It is CLIA’s recommendation that the proposed rule should apply only in cases of:

- (i) A declaration by the Secretary of Health and Human Services of a nationwide Public Health Emergency that
- (ii) Results from events that were public knowledge prior to the passenger’s cancellation.

CLIA maintains the correct standard for the type of emergency that would trigger the rulemaking is a federal nationwide “Public Health Emergency” declaration which affects most or all of the country and the cruise industry, such as the COVID-19 pandemic. CLIA also distinguishes an emergency such as the current pandemic, which was slow-developing and uncertain, from a local or regional event such as storm, which may develop quickly. Cruise line cancellations in the case of a local event give rise to a refund for passengers who were booked on the scheduled sailing, but do not lead to anticipatory passenger cancellations as much as 60 days before the sailing date. CLIA also asserts that state and local authorities have jurisdiction over

only localized or regional situations that tend to be more limited in geographic scope, such as a highway obstruction that temporarily disrupts traffic to a cruise port. CLIA believes that the inclusion of emergencies that do not at some point directly require cancellation would allow subjective interpretations as to whether the passengers were acting reasonably when they cancelled bookings due to the advent of the situation. Further, CLIA believes this would create incentives for passengers who had terminated bookings for personal reasons to try to capitalize on later cancellation rationales that had no bearing on their decision to cancel.

CLIA also believes that declarations from international organizations should not qualify as governmental declarations for this provision. CLIA contends that cruise lines are not likely to cancel U.S. sailings based on a multinational organizations' warnings unless the U.S. government also decides to issue an order. Further, even if a foreign government took action to prevent embarking passengers at U.S. ports from calling in their jurisdiction, cruise lines could change their itineraries or omit foreign calls, and this would not likely result in either cancellation of the sailing or anticipatory passenger cancellations.

***Passenger Vessel Association (PVA)***

PVA asks the Commission to refrain from imposing a refund policy to include a situation in which a passenger voluntarily cancels a booking following the declaration of a public health emergency, but the voyage nevertheless occurs as scheduled. PVA believes that the proposed rule would go beyond the problem of nonperformance of transportation, as in this case there is no "nonperformance of transportation" as envisioned by 46 U.S.C. 44102. PVA further poses the question of by whom is the public health emergency to be declared (whether a federal, state, or local official). PVA maintains that this type of situation is best handled in the context of the commercial relationship between the cruise operator and the customer. PVA states that while the vessel operator may wish to provide a refund or cruise credit as a matter of company policy, it should not be required to do so by the Commission.

PVA also requests the Commission to make clear that the term “public health emergency” includes only events such as the coronavirus pandemic, in which the gathering of persons on a vessel has the potential to worsen the emergency.

#### **IV. DISCUSSION & NPRM PROPOSAL**

##### **A. Definition of nonperformance**

The Commission believes that adding a definition for nonperformance to 46 CFR part 540 would provide clarity to passengers, PVOs, and the participating financial institutions as to when nonperformance has occurred. The Commission has also taken into consideration the potential negative effects of the proposed definition of nonperformance raised by the commenters, particularly the period of time a vessel is delayed as it relates to the definition of nonperformance of transportation. SFAA proposed the definition of nonperformance to be a period of time greater than 24 hours, a minimum of 72 hours, to ensure PVOs are not inundated with claims. The Commission proposes to define nonperformance as when a passenger vessel operator cancels or delays a voyage by three or more calendar days, if the passenger elects not to embark on the delayed or a substitute voyage offered by the PVO. Adoption of the proposed definition will require corresponding changes to all financial instruments.

Due to the proposed definition of nonperformance of transportation and to ensure that passengers are indemnified for nonperformance of transportation, the Commission is proposing a change to require PVOs to report nonperformance of transportation events to the Commission semi-annually. This reporting is necessary in order for the Commission to be responsive to the public and to provide adequate monitoring and statistical information on occurrences of nonperformance. Nonperformance of transportation events occurring between January 1 and June 30 would be reported no later than July 30 of the same calendar year, and events occurring between July 1 and December 31 would be reported no later than January 31 of the following calendar year.

##### **B. Process for Obtaining Refunds from PVO Financial Instruments for Nonperformance of Transportation**

The Commission reiterates its position on the importance of a clear and consistent policy toward refunds from financial instruments in the event of nonperformance of transportation, in an effort to eliminate uncertainty on the part of passengers. The Commission therefore proposes changes to 46 CFR part 540 by adding a *Process for obtaining refunds from the financial instrument in the event of nonperformance* by a PVO. This process would apply in a situation where the PVO claims procedure provides less than 180 days for submission of claims after nonperformance of transportation, and the passenger wishes to submit a claim after the PVO's deadline for submission has passed, the passenger may still seek reimbursement from the financial instrument after providing written notification to the PVO. This provides the passenger with up to 180 days to submit their claim, first to the PVO or, secondarily, to the financial instrument provider. If proper documentation is provided, the refund payment shall be issued within 90 days of submission of the claim to the financial instrument provider.

The Commission elected the period of 90 days for the refund payment considering PVA's comments which stated that smaller PVOs may be unfairly treated under the ANPRM language. They cited an example wherein smaller PVOs were not subject to Centers for Disease Control and Prevention's (CDC) No Sail Orders, but nonetheless they chose to voluntarily cancel planned cruises for safety reasons. In this example, smaller PVOs would be required to provide refunds in a shorter time period (60 days) relative to larger PVOs (180 days). To address this concern, the NPRM proposes a refund payment, under a PVO financial responsibility instrument, to be made within 90 days of submission of claims to the financial responsibility provider, regardless of the reason for nonperformance.

Subsequent to receiving formal comments to the ANPRM, the Commission engaged in additional discussions regarding cost and availability of PVO financial instruments with representatives of financial instrument providers. It was indicated there likely would be an abandonment of the PVO program by many of the financial instrument providers due to the possible direct interaction with passengers and the lack of a formal judgement. The NPRM

proposes passengers first seek refunds from the PVO in order to minimize the direct interaction between passengers and financial instrument providers, and that the financial instrument providers would be permitted to require a formal court judgement.

The Commission is interested in receiving comments from industry stakeholders regarding the potential availability of financial instruments resulting from the proposed change to the definition of nonperformance, and on the proposed process of obtaining refunds from the financial instrument. As discussed in this NPRM, comments received in response to the ANPRM indicate a concern by some stakeholders that the proposed regulatory changes will constrain the current providers of financial instruments from continuing to provide such instruments to PVOs. Commenters have stated that surety companies would be largely unwilling to act as the direct claims handling entity in cases of alleged nonperformance. The Commission is also aware of a concern that banks may view the new regulations as too burdensome and choose not to offer PVOs the option of an escrow account to satisfy PVOs' financial responsibility requirement. In addition, the increased claims activity of commercial providers of travel insurance during the pandemic may influence their determination whether to offer financial instruments to PVOs. Subsequent to receiving formal comments to the ANPRM, the Commission had additional discussions regarding cost and availability of PVO financial instruments with SFAA and Allianz Partners, the largest U.S. travel insurance provider. SFAA reiterated many of the comments received in response to the ANPRM including the likely abandonment of the PVO program by many, if not all, of the surety participants due to the possible direct interaction of passengers with the surety companies and the lack of a court judgement. Further discussion revealed the lack of a court judgement seemed to be the largest obstacle to continued participation. The Commission also spoke with Allianz Partners in an attempt to determine the availability and cost of insurance to fill the void left by the potential abandonment of other financial instruments. It was surprising to learn that Allianz, and likely other travel insurance providers, would have little interest in providing financial coverage to PVOs in the event of nonperformance. The lack of interest

appears to be due to the hesitancy of travel insurance providers to broaden their exposure in the cruise sector due to the impact of the pandemic. The Commission seeks further comment on these and any other anticipated effects on the availability of financial instruments, should the proposed regulations take effect. The NPRM proposes that: (1) the passenger makes a request for refund from the Principal in accordance with the ticket contract. If the ticket contract refund procedure provides less than 180 days to submit a claim, the financial instrument will be available after written notification to Principal; (2) If the passenger is unable to resolve the claim within 180 days after nonperformance, as defined in 46 CFR 540.2, occurs, the passenger may submit a claim against the financial instrument as per instructions on the Commission website. The claim must include a copy of the boarding pass, proof and amount of payment, cancellation notice, and dated proof of properly filed claim against the Principal. All documentation must clearly display the vessel and voyage with scheduled and actual date of sailing. At the discretion of the financial instrument provider a judgment may be required prior to resolving the claim; and (3) valid claims must be paid within 90 days of submission of claim to the financial instrument provider.

Additionally, the Commission decided not to propose a refund process that would apply in a situation when the passenger unilaterally cancels their cruise, which is supported by the ANPRM comments questioning whether those cancellations are nonperformance.

### **C. Definition of Unearned Passenger Revenue (UPR)**

The Commission proposes defining Unearned Passenger Revenue as passenger revenue received for water transportation and all other accommodations, services and facilities that have not been performed by the PVO. Passenger revenue will include port fees, taxes and all ancillary fees submitted to the PVO by the passenger. CLIA recommended to modify the definition to exclude such items as airfare, non-affiliated shore excursions, or other third-party provider costs for which the PVO is no longer holding the passenger's deposit or is contractually obligated to pay such deposit to a third-party provider. In order to provide better protection to the consumer,

and because PVOs have the existing relationship with the providers of ancillary services, the Commission believes PVOs should be responsible for refunding all monies collected by the PVOs for all services, and facilities not yet performed.

#### **D. Publishing Information on How to Obtain Refunds**

The Commission proposes:

- (1) PVOs provide on their websites clear and precise instructions on how passengers may obtain refunds in the event of nonperformance of transportation; and
- (2) PVOs shall submit an active web page address with their refund instructions for nonperformance of transportation to the Commission for publication on the Commission's website.
- (3) Form FMC-131 "Application for Certificate of Financial Responsibility" will include a required field for PVOs to provide the web page address of their refund instructions for nonperformance of transportation.

The Commission seeks further comment on whether the Commission should provide an example webpage with refund instructions in Part 540 and if so, what it should include.

#### **V. PUBLIC PARTICIPATION**

*How do I prepare and submit comments?*

Your comments must be written and in English. To ensure that your comments are correctly filed in the docket, please include the docket number of this document in your comments.

You may submit your comments via email to the email address listed above under ADDRESSES. Please include the docket number associated with this notice and the subject matter in the subject line of the email. Comments should be attached to the email as a Microsoft Word or text-searchable PDF document.

*How do I submit confidential business information?*

The Commission will provide confidential treatment for identified confidential information to the extent allowed by law. If your comments contain confidential information, you must submit the following by email to the address listed above under ADDRESSES:

- A transmittal letter requesting confidential treatment that identifies the specific information in the comments for which protection is sought and demonstrates that the information is a trade secret or other confidential research, development, or commercial information.
- A confidential copy of your comments, consisting of the complete filing with a cover page marked “Confidential-Restricted,” and the confidential material clearly marked on each page.
- A public version of your comments with the confidential information excluded. The public version must state “Public Version—confidential materials excluded” on the cover page and on each affected page, and must clearly indicate any information withheld.

*Will the Commission consider late comments?*

The Commission will consider all comments received before the close of business on the comment closing date indicated above under DATES. To the extent possible, we will also consider comments received after that date.

*How can I read comments submitted by other people?*

You may read the comments received by the Commission at the Commission’s Electronic Reading Room at the address listed above under ADDRESSES.

## **VI. RULEMAKING ANALYSES AND NOTICES**

*Regulatory Flexibility Act*

### **Initial Regulatory Flexibility Analysis**

Under the Regulatory Flexibility Act (RFA), whenever an agency is required to publish general notice of proposed rulemaking, the agency must prepare and make available for public comments an initial regulatory flexibility analysis (IRFA) describing the impact of the proposed rule on small entities, which in this case are PVOs.<sup>23</sup> 5 U.S.C. 603. As discussed below in more

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<sup>23</sup> Under 5 U.S.C. 601, the term small entity is defined as a small business, a not-for-profit enterprise which is independently owned and operated and is not dominant in its field, or a governmental jurisdiction with a population of less than 50,000. A small business is defined as a small business concern under section 3 of the Small Business Act. The Small Business Administration interprets the meaning of business concern as a business entity organized for



detail, the Commission does not collect performance data from small PVOs, nor is such specific information published. Therefore, in this analysis, the Commission has used industry-wide published data as a proxy to estimate the impact of the proposed rule on both small and larger PVOs with a comparative assessment as recommended in the RFA guide of the Small Business Administration (SBA).<sup>24</sup> The Commission encourages comments on its analysis from interested parties with supporting data and information.

The requirements for preparing an IRFA of a proposed rule are set forth in 5 U.S.C. 603 and direct federal agencies to address the following topics:

#### Why the Commission is considering the proposed rule

The proposed rule stems from the Commission's Fact Finding Investigation No. 30: COVID-19 Impact on Cruise Industry, which concluded that clearer guidance is needed in determining whether a passenger is entitled to obtain a refund if a PVO cancels a voyage, makes a significant schedule change, or significantly delays a voyage.

#### Objectives and legal basis for the proposed rule

As discussed in the background section, 46 U.S.C. 44102 requires certain persons arranging, offering, advertising, or providing transportation on vessels to establish financial responsibility for indemnification of passengers for nonperformance of transportation. The proposed rule seeks to provide a clear and consistent policy toward vessel passenger ticket refunds from the PVOs' financial responsibility instruments filed with the Commission, in the case of nonperformance by the vessel operator. The proposed rule primarily does this by defining nonperformance. The proposed rule would add a definition of nonperformance for which passengers would be entitled to a refund of their prepaid fares where voyages are canceled or delayed for three or more days

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profit, with a place of business located in the U.S., and which operates primarily within the U.S. or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials, or labor. 13 CFR 121.105(a)(1).

<sup>24</sup> Office of Advocacy, U.S. Small Business Administration, *A Guide for Government Agencies How to Comply with the Regulatory Flexibility Act* (August 2017), p. 37.

and the passenger does not opt to accept an alternative voyage. Additionally, the proposed rule changes the definition of UPR to remove the language “excludes such items as airfare, hotel accommodations, and tour excursions,” to include such items in the definition of UPR, if the PVO offers and collects money from the passenger for such items.

Determine and estimate the number of small entities to which the new rule will apply

As part of this analysis, 5 U.S.C. 603 (b)(3) requires a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply. The SBA has established regulations to determine whether businesses qualify as small entities. 13 CFR part 121. The regulations use the *North American Industry Classification System* (NAICS) with codes and descriptions to classify businesses and measure their size by either annual receipts (gross annual revenue) or number of employees.<sup>25</sup> The calculation of total annual receipts or number of employees for the purpose of determining the size of a business includes those of the business itself plus those of its domestic and foreign affiliates.<sup>26</sup>

As discussed, the proposed rule would modify the regulations in 46 CFR Subpart A of part 540 governing evidence of PVOs financial responsibility for nonperformance of transportation. The regulated businesses that the proposed rule applies to are PVOs. At present, there are a total of 43 PVOs with certificates of financial responsibility for nonperformance issued by the Commission. Pursuant to the SBA regulations in 13 CFR 121.201, PVOs fall under the classification of NAICS code 483112, *Deep Sea Passenger Transportation*, and under this classification, businesses with a total number of 1,500 employees or less qualify as small. Accordingly, the Commission estimates that 14 out of the 43 certified PVOs (or 33 percent) qualify as small businesses under the size standard of the SBA. While there may be PVOs that report employees of less than 1,500, lines that are subsidiaries of much larger companies would

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<sup>25</sup> See 13 CFR subpart A – *Size Eligibility Provisions and Standards* (January 1, 2020).

<sup>26</sup> See 13 CFR 121.104 and 121.106.

not qualify as small entities for the intent of receiving regulatory relief under the RFA. *See* 13 CFR 121.106(b)

In terms of the economic impact on small PVOs, the proposed rule would add a definition of nonperformance for which passengers would be entitled to a refund of their prepaid fares where voyages are canceled or delayed for three or more days and the passenger does not opt to accept an alternative voyage. This new definition would potentially increase the number of claims for refunds, which in turn may affect the cost and method used by a PVO to cover the passengers' prepaid fares. In effect, under the proposed definition, PVOs that perform well and on time as scheduled would be less impacted than PVOs that perform poorly. The Commission has no data or information on the performance of the 14 small PVOs (per the specifics of the proposed definition) by which to gauge which ones would be more significantly impacted by the proposed rule, and no such information is published. The proposed rule would require that all certified PVOs semi-annually report instances of non-performance by which the Commission could make this determination in the future. Therefore, the Commission assumes that all of the 14 small PVOs would be impacted by the proposed rule by varying degrees depending on their performance and other factors affecting their performance. The Commission seeks public comments on its assumption and the economic impact of the proposed rule on small PVOs supported by performance data on the cancelation or delay of voyages, as per the proposed definition of nonperformance.

#### Projected reporting, record keeping, and other compliance requirements of the new rule

##### *Cost to government*

The Commission estimates the total annual cost of this proposed rule to the Federal government to be \$145,356, offset by the collection of \$64,482 in filing fees, for a net annual cost of \$80,874.

##### *Record keeping and File Costs to PVOs*

The proposed rule would require that PVOs submit additional semi-annual reports on their instances of nonperformance. The estimated annual cost of the additional reports would be \$41,670.

#### *Other Costs to PVOs*

The definition of nonperformance under the proposed rule would likely increase instances of non-performance by PVOs and thus obligations on financial instruments filed with the Commission. The obligations on financial instruments may occur when a cruise has been delayed by more than three days or canceled and the passenger desires a refund instead of a credit on a future cruise. In turn, the change in the definition of UPR to include other items in addition to cruise fare (plus fees and taxes) offered and collected by the PVO could increase the amount of the refund and the cost to the PVO or discourage PVOs from offering such items to passengers. Prior to the proposed rule, the passenger vessel program focused on when PVOs ceased operations and canceled remaining cruises. Existing policies regarding cancellations and refunds vary by PVO. In general, most PVOs provide refunds or credits for cancelled voyages or partial refunds for voyages that are forced to end early, but it is unclear whether PVOs may provide refunds for delayed voyages.

In response to the ANPRM, the Surety and Fidelity Association of America noted that because of the likely increase of instances of nonperformance “sureties likely will require PVOs to have stronger balance sheets, specifically more cash on hand or larger lines of credit, thereby narrowing the universe of PVOs eligible to receive a surety bond guaranteeing this obligation.” Also, they claimed that the required amount or value of collateral could be increased.

The increased costs to the PVOs would be from three factors. First, the increased cost of financial instruments to cover UPR because of possible increases in non-performance and issue more credits or refunds for certain delayed voyages now defined as nonperformance under this NPRM. Second, PVOs would have to refund additional purchases by passengers such as airfare and third-party excursions that were previously excluded from the definition of UPR before the

proposed rule. Third, for PVOs using escrow accounts, the opportunity cost of having to hold additional cash on hand that is unable to be deployed as capital elsewhere.

To estimate the total cost to the industry, the Commission would need to know:

- The estimated rate of nonperformance by PVOs;
- The likelihood that passengers would request refunds instead of opting for future cruise credits;
- The impact of the prior two items on the cost of financial instruments;
- Whether or not companies offering financial instruments would leave the market, or if PVOs could meet the requirements to obtain financial instruments; and
- Estimated changes to UPR by removing the exclusion of “such items as airfare, hotel accommodations, and tour excursions” from the definition of UPR, to the extent offered and collected by PVOs.

The Commission believes it has an estimate for historical rates of nonperformance. The Commission is not certain on the likelihood that consumers would request refunds instead of receiving credits, nor the size of increase the proposed rule would have on premiums and the ability of PVOs to obtain financial instruments. The lack of data on these items makes it difficult to provide an accurate cost estimate. The Commission seeks public comments on the aforementioned items from interested parties supported by data and additional information.

The Cruise Line International Association (CLIA) publishes data on significant operational incidents that can be used to estimate past nonperformance by PVOs. Significant operational incidents are defined as delays of more than 24 hours to published itinerary, fatalities occurring to either passengers or crew, and serious injury occurring to either passengers or crew.<sup>27</sup>

It is difficult to separate out all the significant operational incidents to know for certain which ones would meet the definition of nonperformance under the proposed rule. However, the total number of significant operational incidents reported by CLIA sets an upper bound limit for

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<sup>27</sup> See *Report on Operational Incidents 2009 to 2019*, Cruise Line International Association, <https://cruising.org/en/news-and-research/research/2020/may/report-on-operational-incidents-2009-to-2019>

how often instances of nonperformance, as defined by the proposed rule, have occurred in the past.

Between 2009 and 2019, there were 195 significant operational incidents for an average of 17.7 annually. The data for significant operational incidents is reported globally so the number of instances occurring from U.S. embarkations would be lower. To estimate the number of incidents in the U.S., the ratio of global incidents to global number of passengers was applied to the number of passengers embarking from the U.S. on an annual basis. The estimated number of annual incidents for the U.S. is 8.4.

As previously stated, this estimate serves as an upper bound of how many instances of nonperformance may occur under the proposed rule. U.S. per capita incident rates may vary from the global per capita incident rates. Additionally, CLIA reports that incidents appear to be trending downward.

Year	Significant Incidents	Global Passengers	U.S. Embarkations	Estimated US incidents
2009	21	17,800,000	8,900,000	10.5
2010	27	19,100,000	9,690,000	13.7
2011	15	20,500,000	9,840,000	7.2
2012	18	20,900,000	10,090,000	8.7
2013	21	21,300,000	9,960,000	9.8
2014	16	22,340,000	11,060,000	7.9
2015	21	26,060,000	10,920,000	8.8
2016	16	25,155,000	11,660,000	7.4
2017	13	26,716,000	12,200,000	5.9
2018	14	28,515,000	12,680,000	6.2
2019	13	29,673,000	13,790,000	6.0

Data on significant incidents compiled from CLIA's *Report on Operational Incidents 2009 to 2019*. Data on global passengers compiled from CLIA's annual reports. Data on U.S. embarkations compiled from CLIA's *Economic Contribution of the International Cruise Industry in the United States* publications.

Using significant operational incidents as a proxy for nonperformance, the next step in this analysis is to compare it to how many instances of nonperformance occur under the existing program.

Under its program, the Commission records when PVOs cease their operations. Since September 2000, 16 PVOs covered by the Commission's program have ceased operations and another company declared bankruptcy but successfully restarted operations later.<sup>28</sup> There have been 17 PVOs over the last 21 years that ceased operations for an average of 0.81 incidents per year, where a company either declared bankruptcy or ceased operations.

Significant operational incidents occur much more frequently than incidents where PVOs cease operations or declare bankruptcy. The estimated number of significant operational incidents is 8.4 annually compared to a rate of 0.81 under the Commission's current program. Adding the average incident rate of a company ceasing operations or declaring bankruptcy to the rate of significant operation incidents would equate to a rate of 9.21 incidents per year where a PVOs financial instrument may be impacted or a 10-fold increase from the current incident rate of nonperformance, when PVOs cease operating. However, this impact is mitigated by the fact that many PVOs on their own terms, including those determined to be small under the SBA guidelines, already provide refunds of prepaid fares to passengers in the case of voyage cancellations. The Commission seeks public comments from interested parties on the above methodology for incidents of nonperformance, other estimates of PVO nonperformance, and the impact the rate of nonperformance would have on surety bond premiums and other PVO financial instruments, with supporting data and information.

For these reasons, the Commission believes that the proposed rule could increase the cost of UPR coverage to PVOs by 25 percent. Based on the investigation in Fact Finding No. 30 and its own research, the Commission estimates the cost of UPR coverage to range from \$75,000 for

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<sup>28</sup> The PVOs that ceased operations are: Premier Cruise Operations Ltd. (Premier), New Commodore Cruise Lines Limited (New Commodore), Cape Canaveral Cruise Lines, Inc., MP Ferryamar, Inc., American Classic Voyages Company (American Classic), Royal Olympic, Regal Cruises, Ocean Club Cruise Line, Society Expeditions, Scotia Prince, Glacier Bay, Great American Rivers, RiverBarge Excursion Lines, Inc., Majestic America Line, and West Travel, Inc. d/b/a Cruise West, and French American Lines. Most of these incidents occurred in the 2000s with only one company ceasing operations in the last decade. At least one additional company, Haimark Line Ltd, declared bankruptcy and emerged successfully from it to continue operations.

the smallest of PVOs to around \$600,000 for the largest. The total cost of current UPR coverage is estimated to be around \$9,830,000. Assuming a 25 percent increase, the cost would rise by \$2,457,500 to a total of \$12,287,500. However, there is uncertainty about how much the cost would rise given the variance in the rate of incidents of nonperformance for each PVO. Breaking down the costs increases by size of PVOs, the total increase for small PVOs would be \$425,000 for a total cost of \$2,125,000 and for large PVOs would be \$2,032,500 for a total cost of \$10,162,500.

The removal of the language “excludes such items as airfare, hotel accommodations, and tour excursions” from the definition of unearned passenger revenue might also increase the amount of refunds to passengers (and the cost to the PVO) and the amount of UPR held by PVOs, to the extent that PVOs offered and collected money for such items. Currently, 22 companies’ UPR exceeds the \$32 million coverage cap set by the Commission and pegged to inflation and thus would be unaffected by rising UPR. For the remaining 21 companies, their UPR would likely rise causing their premiums or money held in escrow to increase. This change may disproportionately impact smaller PVOs since their UPR is below the current coverage cap. The Commission seeks comments on how the change in the definition would increase the amount of refunds to passengers and UPR for PVOs.

#### Alternatives for small entities

The RFA requires agencies to consider significant alternatives for small businesses. The Commission has demonstrated flexibility during the rulemaking process by publishing an ANPRM and taking into consideration the comments from parties impacted by the proposed rule. The Commission responded to comments about the definition of nonperformance by changing the timing element in the proposed definition of nonperformance from 24 hours to three calendar days.

#### Other possible alternatives are discussed



### *Exempt small entities from the proposed rule*

Exempting small entities from the proposed rule would likely keep costs of obtaining certification the same as they are now for small entities. The commission could move forward with the definition of nonperformance and expanded UPR for entities above a specific revenue threshold. However, exempting small entities would mean the consumer protections from the proposed rule would not apply to passengers booking cruises on small PVOs. Therefore, simply exempting small entities would not meet the consumer protection objectives of the proposed rule.

### *Delayed compliance of the proposed for small entities*

In comments in response to the ANPRM, the Commission has received feedback that there is uncertainty regarding how financial institutions will respond to the proposed rule with respect to the financial instruments they offer. In the most extreme scenario, some surety companies may leave the market entirely and certain PVOs would be forced to switch to escrow accounts or other forms of financial instruments. Delaying the compliance deadline of the proposed rule for small PVOs would allow for the market for financial instruments to adjust to the new conditions resulting from the proposed rule and potentially new financial instruments to emerge. The transition costs of the proposal would be mainly borne by large PVOs. Companies offering financial instruments would have additional time to study the impacts of the proposed rule on small entities. The Commission requests comments on whether a delay for small PVOs would be beneficial and how long of a delay to allow the market for financial instruments to adjust.

### *Longer period before nonperformance for small entities*

The proposed rule could be amended to allow for a longer period of delay before a cruise is defined as nonperforming. For small PVOs, the proposed rule could allow 4 or 5-day delay of scheduled departure. This would reduce the cost to small entities as they would have a lower likelihood of nonperformance. The drawback to this alternative is that it would create a two-tier

structure of refund policies for consumers. One of the main objectives of the proposed rule is to provide clarity to consumers on refunds by creating a standard policy. A separate definition of noncompliance for small entities would lessen consumer protections and go against the objectives of the proposed rule by straying from a standard refund policy.

Relevant federal rules that may duplicate, overlap, or conflict with the proposed rule

The Commission is not aware of any other federal rules that duplicate, overlap, or conflict with the proposed rule.

*National Environmental Policy Act*

The Commission's regulations categorically exclude certain rulemakings from any requirement to prepare an environmental assessment or an environmental impact statement because they do not increase or decrease air, water or noise pollution or the use of fossil fuels, recyclables, or energy. 46 CFR 504.4. The NPRM discusses potential amendments to Commission's program for certifying the financial responsibility of PVOs. This rulemaking thus falls within the categorical exclusion for "[c]ertification of financial responsibility of passenger vessels" under 46 CFR 504.4(a)(2). Therefore, no environmental assessment or environmental impact statement is required.

*Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) (PRA) requires an agency to seek and receive approval from the Office of Management and Budget (OMB) before collecting information from the public. 44 U.S.C. 3507. The agency must submit collections of information in proposed rules to OMB in conjunction with the publication of the notice of proposed rulemaking. 5 CFR 1320.11.

The information collection requirements associated with the Application for Certificate of Financial Responsibility filing requirements in part 540 are currently authorized under OMB Control Number 3072-0012. In compliance with the PRA, the Commission has submitted the

proposed revised information collection to the Office of Management and Budget and is requesting comment on the proposed revision.

Title: 46 CFR Part 540—Application for Certificate of Financial Responsibility

OMB Control Number: 3072-0012.

Abstract: 46 U.S.C. 44102, 44103 and 46 CFR part 540 require passenger vessel operators to file unearned passenger revenue reports confidentially with the Commission.

Current Action: The proposed rule would amend (1) the Application for Certificate of Financial Responsibility filing requirements adding the website and (2) unearned passenger revenue reports by PVOs adding nonperformance of transportation occurrences. Currently, part 540 requires that passenger vessel operators file unearned passenger revenue only, on a semiannual basis.

Type of Request: Revision of a previously approved collection.

Needs and Uses: The Commission issues certificates (Performance and Casualty) to PVOs for the Indemnification of Passengers for Nonperformance of Transportation and Financial Responsibility to Meet Liability Incurred for Death or Injury to Passengers or Other Persons under Public Law 89-777 (codified as 46 U.S.C. 44102 and 44103).

Frequency: Filings are submitted to the Commission on a semiannual basis.

Type of Respondents: Passenger vessel operators or their duly appointed agents are required to file applications and unearned passenger revenue reports with the Commission.

Number of Annual Respondents: The Commission does not anticipate that the proposed revisions would affect the number of respondents. As a general matter, however, the number of respondents has decreased since the last revision to the information collection. The Commission estimates an annual respondent universe of 48 passenger vessel operators.

Estimated Time per Response: The Commission does not anticipate that the proposed revisions would affect the estimated time per response, which would continue to be 8 person-

hours for reporting and recordkeeping requirements contained in the regulations and for completing Form-131.

**Total Annual Burden:** The Commission does not anticipate that the proposed revisions would affect the number of applications or unearned passenger revenue reports filed, however there will be an increase in the burden associated with each filing and would in fact affect the total annual burden. Due to the increase in the amount of information being collected since the last revision, the Commission expects that the total annual burden will increase. The Commission estimates the total person-hour burden at 2,087 person-hours.

Comments are invited on:

- Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- Whether the Commission's estimate for the burden of the information collection is accurate;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Please submit any comments, identified by the docket number in the heading of this document, by the methods described in the ADDRESSES section of this document.

*Executive Order 12988 (Civil Justice Reform)*

The Commission will ensure that any proposed or final rule issued in this proceeding meets the applicable standards in E.O. 12988 titled, "Civil Justice Reform," to minimize litigation, eliminate ambiguity, and reduce burden.

*Regulation Identifier Number*

The Commission assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda). The Regulatory Information Service Center publishes the Unified Agenda in April and October

of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda, available at <http://www.reginfo.gov/public/do/eAgendaMain>.

## **VII. PROPOSED REGULATORY LANGUAGE**

### **List of Subjects in 46 CFR Part 540**

Insurance, Maritime carriers, Penalties, Reporting and recordkeeping requirements, Surety bonds.

For the reasons stated in the preamble, the Federal Maritime Commission proposes to amend part 540 of Title 46 Code of Federal Regulations as follows:

### **PART 540-PASSENGER FINANCIAL RESPONSIBILITY**

1. The authority citation for part 540 continues to read as follows:

Authority: 5 U.S.C. 552, 553; 31 U.S.C. 9701; 46 U.S.C. 305, 44101-44106.

2. Amend § 540.2 by revising paragraph (i) and adding paragraph (m) to read as follows:

#### **§ 540.2 Definitions.**

\* \* \* \* \*

(i) *Unearned Passenger Revenue* means that passenger revenue received for water transportation and all other accommodations, services, and facilities that have not been performed by the PVO. Passenger revenue includes port fees, taxes, and all ancillary fees remitted to the PVO by the passenger.

\* \* \* \* \*

(m) *Nonperformance of transportation* means cancelling or delaying a voyage by three (3) or more calendar days, if the passenger elects not to embark on the delayed voyage or a substitute voyage offered by the passenger vessel operator.

3. Amend § 540.9 by revising paragraphs (f), (h), and (i) to read as follows:

#### **§ 540.9 Miscellaneous.**

\* \* \* \* \*

*(f) Process for obtaining refunds from the financial instrument in the event of nonperformance.*

(1) The passenger must make a written request for a refund from the PVO in accordance with the respective PVO's claims procedures. If the PVO claims procedure provides less than 180 days for submission of claims after nonperformance of transportation, the passenger may seek reimbursement from the financial instrument provider after providing written notification to the PVO.

(2) In the event the passenger is unable to resolve the claim within 180 days after nonperformance of transportation occurs or if the claim is denied by the PVO, the passenger may submit a claim against the financial instrument as per instructions on the Commission website. The claim must include a copy of the boarding pass, proof and amount of payment, the cancellation or delay notice, and dated proof of properly filed claim against the PVO or written notification as required in paragraph (1) above. All documentation must clearly display the vessel and voyage with the scheduled and actual date of sailing.

\* \* \* \* \*

(h) Every person who has been issued a Certificate (Performance) must submit to the Commission a semi-annual statement of any changes with respect to the information contained in the application or documents submitted in support thereof or a statement that no changes have occurred. Negative statements are required to indicate no change. These statements must cover the 6-month period of January through June and July through December and include a statement of the highest unearned passenger vessel revenue accrued for each month in the 6-month reporting period as well as any instances of nonperformance of transportation. Such statements will be due within 30 days after the close of every such 6-month period. The reports required by this paragraph shall be submitted to the Bureau of Certification and Licensing at its office in Washington by certified mail, courier service, or electronic submission.

(i) *Information on How to Obtain Refunds.* (1) PVOs shall provide on their websites clear instructions on how passengers may obtain refunds in the event of nonperformance of transportation; and

(2) PVOs shall submit an active web page address with their refund instructions for nonperformance of transportation to the Commission for publication on the Commission's website.

(3) Form FMC-131 "Application for Certificate of Financial Responsibility" will include a required field for PVOs to provide the web page address of their refund instructions for nonperformance of transportation.

\* \* \* \* \*

4. In Subpart A of Part 540, revise Form FMC-132A to read follows:

**Form FMC-132A to Subpart A of Part 540**

FORM FMC-132A

FEDERAL MARITIME COMMISSION

*Passenger Vessel Surety Bond (Performance)*

Surety Co. Bond No. \_\_\_\_\_

FMC Certificate No. \_\_\_\_\_

Know all persons by these presents, that we \_\_\_\_\_ (Name of applicant), of \_\_\_\_\_ (City), \_\_\_\_\_ (State and country), as Principal (hereinafter called Principal), and \_\_\_\_\_ (Name of surety), a company created and existing under the laws of \_\_\_\_\_ (State and country) and authorized to do business in the United States as Surety (hereinafter called Surety) are held and firmly bound unto the United States of America in the penal sum of \_\_\_\_\_, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents. Whereas the Principal intends to become a holder of a Certificate (Performance) pursuant to the provisions of 46 CFR Part 540, Subpart A, and has elected to file with the Federal Maritime Commission (Commission) such a bond to insure financial responsibility and the supplying transportation and other services subject to 46 CFR Part 540, Subpart A.

Whereas this bond is written to assure compliance by the Principal as an authorized holder of a Certificate (Performance) pursuant to subpart A of part 540 of title 46, Code of Federal Regulations, and shall inure to the benefit of any and all passengers to whom the Principal may be held legally liable for any of the damages herein described. Now, therefore, the condition of this obligation is such that if the Principal shall pay or cause to be paid to passengers any sum or sums for which the Principal may be held legally liable by reason of the Principal's failure faithfully to provide such transportation and other accommodations and services 46 CFR 540, Subpart A made by the Principal

and the passenger while this bond is in effect for the supplying of transportation and other services pursuant to and in accordance with the provisions of subpart A of part 540 of title 46, Code of Federal Regulations, then this obligation shall be void, otherwise, to remain in full force and effect. Whereas this bond is written to assure compliance by the Principal as an authorized holder of a Certificate (Performance) pursuant to 46 CFR Part 540, Subpart A, and shall inure to the benefit of any and all passengers to whom the Principal may be held legally liable for any of the damages herein described. Now, Therefore, the condition of this obligation is that the penalty amount of this bond shall be available to pay damages made pursuant to passenger claims, if:

(1) the passenger makes a request for refund from the Principal in accordance with the ticket contract. If, the ticket contract refund procedure provides less than 180 days, this bond shall be available after written notification to Principal.

(2) If the passenger is unable to resolve the claim within 180 days after nonperformance, as defined in 46 CFR 540.2, occurs, the passenger may submit a claim against the bond as per instructions on the Commission website. The claim must include a copy of the boarding pass, proof and amount of payment, cancellation notice, and dated proof of properly filed claim against the Principal. All documentation must clearly display the vessel and voyage with scheduled and actual date of sailing. And, Surety reserves the discretion to require a judgement prior to resolving the claim.

(3) Valid claims must be paid within 90 days of submission to the Surety.

The liability of the Surety with respect to any passenger shall not exceed the passage price paid by or on behalf of such passenger. The liability of the Surety shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penalty of the bond, but in no event shall the Surety's obligation hereunder exceed the amount of said penalty. The Surety agrees to furnish written notice to the Federal Maritime Commission forthwith of all suits filed, judgments rendered, and payments made by said Surety under this bond.

This bond is effective the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, 12:01 a.m., standard time at the address of the Principal as stated herein and shall continue in force until terminated as hereinafter provided. The Principal or the Surety may at any time terminate this bond by written notice sent by certified mail, courier service, or other electronic means such as email and fax to the other and to the Federal Maritime Commission at its office in Washington, DC, such termination to become effective thirty (30) days after actual receipt of said notice by the Commission, except that no such termination shall become effective while a voyage is in progress. The Surety shall not be liable hereunder for any refunds due under ticket contracts made by the Principal for the supplying of transportation and other services after the termination of this bond as herein provided, but such termination shall not affect the liability of the Surety hereunder for refunds arising from ticket contracts made by the Principal for the supplying of transportation and other services prior to the date such termination becomes effective.

The underwriting Surety will promptly notify the Director, Bureau of Certification and Licensing, Federal Maritime Commission, Washington, DC 20573, of any claim(s) or disbursements against this bond.

In witness whereof, the said Principal and Surety have executed this instrument on \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

**PRINCIPAL**



Name\_\_\_\_\_

By \_\_\_\_\_  
(Signature and title)

Witness\_\_\_\_\_

**SURETY**

[SEAL]

Name\_\_\_\_\_

By \_\_\_\_\_  
(Signature and title)

Witness\_\_\_\_\_

Only corporations or associations of individual insurers may qualify to act as surety, and they must establish to the satisfaction of the Federal Maritime Commission legal authority to assume the obligations of surety and financial ability to discharge them.

5. In Subpart A of Part 540, revise Form FMC-133A to read follows:

**Form FMC-133A to Subpart A of Part 540**

FORM FMC-133A

FEDERAL MARITIME COMMISSION

*Guaranty in Respect of Liability for Nonperformance*

Guaranty No. \_\_\_\_\_

FMC Certificate No. \_\_\_\_\_

1. Whereas \_\_\_\_\_ (Name of applicant) (Hereinafter referred to as the "Applicant") is the Owner or Charterer of the passenger Vessel(s) specified in the annexed Schedule ("the Vessels"), which are or may become engaged in voyages to or from United States ports, and the Applicant desires to establish its financial responsibility in accordance with 46 CFR Part 540, Subpart A, provided that the Federal Maritime Commission ("FMC") shall have accepted, as sufficient for that purpose, the Applicant's application, supported by this Guaranty, and provided that FMC shall issue to the

Applicant a Certificate (Performance) ("Certificate"), the undersigned Guarantor hereby guarantees to discharge the Applicant's legal liability to indemnify the passengers of the Vessels for nonperformance of transportation within the meaning of 46 CFR Part 540.2, in the event that:

(1) the passenger makes a request for refund from the Principal in accordance with the ticket contract. If, the ticket contract refund procedure provides less than 180 days, this Guaranty shall be available after written notification to Principal.

(2) If the passenger is unable to resolve the claim within 180 days after nonperformance, as defined in 46 CFR 540.2, occurs, the passenger may submit a claim against the Guaranty as per instructions on the Commission website. The claim must include a copy of the boarding pass, proof and amount of payment, cancellation notice, and dated proof of properly filed claim against the Principal. All documentation must clearly display the vessel and voyage with scheduled and actual date of sailing. And, Guarantor reserves the discretion to require a judgement prior to resolving the claim.

(3) Valid claims must be paid within 90 days of submission to the Guarantor.

2. The Guarantor's liability under this Guaranty in respect to any passenger shall not exceed the amount paid by such passenger; and the aggregate amount of the Guarantor's liability under this Guaranty shall not exceed \$\_\_\_\_\_.

3. The Guarantor's liability under this Guaranty shall attach only in respect of events giving rise to a cause of action against the Applicant, in respect of any of the Vessels, for nonperformance of transportation within the meaning of 46 CFR 540.2, occurring after the Certificate has been granted to the Applicant, and before the expiration date of this Guaranty, which shall be the earlier of the following dates:

(a) The date whereon the Certificate is withdrawn, or for any reason becomes invalid or ineffective; or

(b) The date 30 days after the date of receipt by FMC of notice in writing delivered by certified mail, courier service or other electronic means such as email and fax, that the Guarantor has elected to terminate this Guaranty except that: (i) If, on the date which would otherwise have been the expiration date under the foregoing provisions (a) or (b) of this Clause 3, any of the Vessels is on a voyage whereon passengers have been embarked at a United States port, then the expiration date of this Guaranty shall, in respect of such Vessel, be postponed to the date on which the last passenger on such voyage shall have finally disembarked; and (ii) Such termination shall not affect the liability of the Guarantor for refunds arising from ticket contracts made by the Applicant for the supplying of transportation and other services prior to the date such termination becomes effective.

4. If, during the currency of this Guaranty, the Applicant requests that a vessel owned or operated by the Applicant, and not specified in the annexed Schedule, should become subject to this Guaranty, and if the Guarantor accedes to such request and so notifies FMC in writing or other electronic means such as email and fax, then, provided that within 30 days of receipt of such notice, FMC shall have granted a Certificate, such Vessel shall thereupon be deemed to be one of the Vessels included in the said Schedule and subject to this Guaranty.

5. The Guarantor hereby designates \_\_\_\_\_, with offices at \_\_\_\_\_, as the Guarantor's legal agent for service of process for the purposes of the Rules of the Federal Maritime Commission, in accordance with 46 CFR Part 540, Subpart A

---

(Place and Date of Execution)

---

(Type Name of Guarantor)

---

(Type Address of Guarantor)

By \_\_\_\_\_  
(Signature and Title)

Schedule of Vessels Referred to in Clause 1

Vessels Added to This Schedule in Accordance With Clause 4

6. In Subpart A of Part 540, revise Appendix A to Subpart A of Part 540—Example of Escrow Agreement for Use Under 46 CFR 540.5(b) to read as follows:

**Appendix A to Subpart A of Part 540—Example of Escrow Agreement for Use Under 46 CFR 540.5(b)**

ESCROW AGREEMENT

THIS ESCROW AGREEMENT, made as of this \_\_ day of (month & year), by and between (Customer), a corporation/company having a place of business at ("Customer") \_\_\_\_\_ and (Banking Institution name & address) a banking corporation, having a place of business at ("Escrow Agent").

Witnesseth:

WHEREAS, Customer wishes to establish an escrow account in order to provide for the indemnification of passengers in the event of non-performance of water transportation to which such passengers would be entitled, and to establish Customer's financial responsibility therefore; and

WHEREAS, Escrow Agent wishes to act as Escrow Agent of the escrow account established hereunder;

NOW, THEREFORE, in consideration of the premises and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. Customer has established on (month, & year) (the "Commencement Date") an escrow account with the Escrow Agent which escrow account shall hereafter be governed by the terms of this Agreement (the "Escrow Account"). Escrow Agent shall maintain the Escrow Account in its name, in its capacity as Escrow Agent.

2. Customer will determine, as of the date prior to the Commencement Date, the amount of unearned passenger revenue, including any funds to be transferred from any predecessor Escrow Agent. Escrow Agent shall have no duty to calculate the amount of unearned passenger revenue. Unearned Passenger Revenues are defined as that passenger revenue received for water transportation and all other accommodations, services and facilities relating thereto not yet performed. 46 CFR 540.2(i).

3. Customer will deposit on the Commencement Date into the Escrow Account cash in an amount equal to the amount of Unearned Passenger Revenue determined under Paragraph 2 above plus a cash amount ("the Fixed Amount") equal to (10 percent of the Customer's highest Unearned Passenger Revenue for the prior two fiscal years. For periods on or after (year of agreement (2009)), the Fixed Amount shall be determined by the Commission on an annual basis, in accordance with 46 CFR Part 540.

4. Customer acknowledges and agrees that until such time as a cruise has been completed and Customer has taken the actions described herein, Customer shall not be entitled, nor shall it have any interest in any funds deposited with Escrow Agent to the extent such funds represent Unearned Passenger Revenue.

5. Customer may, at any time, deposit additional funds consisting exclusively of Unearned Passenger Revenue and the Fixed Amount, into the Escrow Account and Escrow Agent shall accept all such funds for deposit and shall manage all such funds pursuant to the terms of this Agreement.

6. After the establishment of the Escrow Account, as provided in Paragraph 1, Customer shall on a weekly basis on each (identify day of week), or if Customer or Escrow Agent is not open for business on (identify day of week) then on the next business day that Customer and Escrow Agent are open for business recompute the amount of Unearned Passenger Revenue as of the close of business on the preceding business day (hereinafter referred to as the "Determination Date") and deliver a Recomputation Certificate to Escrow Agent on such date. In each such weekly recomputation Customer shall calculate the amount by which Unearned Passenger Revenue has decreased due to (i) the cancellation of reservations and the corresponding refund of monies from Customer to the persons or entities canceling such reservations; (ii) the amount which Customer has earned as revenue as a result of any cancellation fee charged upon the cancellation of any reservations; (iii) the amount which Customer has earned due to the completion of cruises; and (iv) the amount by which Unearned Passenger Revenue has increased due to receipts from passengers for future water transportation and all other accommodations, services and facilities relating thereto and not yet performed.

The amount of Unearned Passenger Revenue as recomputed shall be compared with the amount of Unearned Passenger Revenue for the immediately preceding period to determine whether there has been a net increase or decrease in Unearned Passenger Revenue. If the balance of the Escrow Account as of the Determination Date exceeds the sum of the amount of Unearned Passenger Revenue, as recomputed, plus the Fixed Amount then applicable, then Escrow Agent shall make any excess funds in the Escrow Account available to Customer. If the balance in the Escrow Account as of the Determination Date is less than the sum of the amount of Unearned Passenger Revenue, as recomputed, plus an amount equal to the Fixed Amount, Customer shall deposit an amount equal to such deficiency with the Escrow Agent. Such deposit shall be made in immediately available funds via wire transfer or by direct transfer from the Customer's U.S. Bank checking account before the close of business on the next business day following the day on which the Recomputation Certificate is received by Escrow Agent. The Escrow Agent shall promptly notify the Commission

within two business days any time a deposit required by a Recomputation Certificate delivered to the Escrow Agent is not timely made.

7. Customer shall furnish a Recomputation Certificate, in substantially the form attached hereto as Annex 1, to the Federal Maritime Commission (the "Commission") and to the Escrow Agent setting forth the weekly recomputation of Unearned Passenger Revenue required by the terms of Paragraph 6 above. Customer shall mail or fax to the Commission and deliver to the Escrow Agent the required Recomputation Certificate before the close of business on the business day on which Customer recomputes the amount of Unearned Passenger Revenue. Notwithstanding any other provision herein to the contrary, Escrow Agent shall not make any funds available to Customer out of the Escrow Account because of a decrease in the amount of Unearned Passenger Revenue or otherwise, until such time as Escrow Agent receives the above described Recomputation Certificate from Customer, which Recomputation Certificate shall include the Customer's verification certification in the form attached hereto as Annex 1. The copies of each Recomputation Certificate to be furnished to the Commission shall be mailed to the Commission at the address provided in Paragraph 25 herein. If copies are not mailed to the Commission, faxed or emailed copies shall be treated with the same legal effect as if an original signature was furnished. No repayment of the Fixed Amount may be made except upon approval of the Commission.

Within fifteen (15) days after the end of each calendar month, Escrow Agent shall provide to Customer and to the Commission at the addresses provided in Paragraph 25 below, a comprehensive statement of the Escrow Account. Such statement shall provide a list of assets in the Escrow Account, the balance thereof as of the beginning and end of the month together with the original cost and current market value thereof, and shall detail all transactions that took place with respect to the assets and investments in the Escrow Account during the preceding month.

8. At the end of each quarter of Customer's fiscal year, Customer shall cause the independent auditors then acting for it to conduct an examination in accordance with generally accepted auditing standards with respect to the weekly Recomputation Certificates furnished by Customer of the Unearned Passenger Revenues and the amounts to be deposited in the Escrow Account and to express their opinion within forty-five (45) days after the end of such quarter as to whether the calculations at the end of each fiscal quarter are in accordance with the provisions of Paragraph 6 of this Agreement. The determination of Unearned Passenger Revenue of such independent auditors shall have control over any computation of Unearned Passenger Revenue by Customer in the event of any difference between such determinations. To the extent that the actual amount of the Escrow Account is less than the amount determined by such independent auditors to be required to be on deposit in the Escrow Account, Customer shall immediately deposit an amount of cash into the Escrow Account sufficient to cause the balance of the Escrow Account to equal the amount determined to be so required. Such deposit shall be completed no later than the business day after receipt by the Escrow Agent of the auditor's opinion containing the amount of such deficiency.

The opinion of such independent auditors shall be furnished by such auditors directly to Customer, to the Commission and to the Escrow Agent at their addresses contained in this Agreement. In the event that a required deposit to the Escrow Agent is not made within one Business Day after receipt of an auditor's report or a Recomputation Certificate, Escrow Agent shall send notification to the Commission within the next two Business Days.

9. Escrow Agent shall invest the funds in the Escrow Account in Qualified Investments as directed by Customer in its sole and absolute discretion. "Qualified Investments" means, to the extent permitted by applicable law:

(a) Government obligations or obligations of any agency or instrumentality of the United States of America;

(b) Commercial paper issued by a United States company rated in the two highest numerical "A" categories (without regard to further gradation or refinement of such rating category) by Standard & Poor's Corporation, or in the two highest numerical "Prime" categories (without regard to further gradation or refinement of such rating) by Moody's Investor Services, Inc.;

(c) Certificates of deposit and money market accounts issued by any United States bank, savings institution or trust company, including the Escrow Agent, and time deposits of any bank, savings institution or trust company, including the Escrow Agent, which are fully insured by the Federal Deposit Insurance Corporation;

(d) Corporate bonds or obligations which are rated by Standard & Poor's Corporation or Moody's Investors Service, Inc. in one of their three highest rating categories (without regard to any gradation or refinement of such rating category by a numerical or other modifier); and

(e) Money market funds registered under the Federal Investment Company Act of 1940, as amended, and whose shares are registered under the Securities Act of 1933, as amended, and whose shares are rated "AAA", "AA + " or "AA" by Standard & Poor's Corporation.

10. All interest and other profits earned on the amounts placed in the Escrow Account shall be credited to Escrow Account.

11. This Agreement has been entered into by the parties hereto, and the Escrow Account has been established hereunder by Customer, to establish the financial responsibility of Customer as the owner, operator or charterer of the passenger vessel(s) (see Exhibit A), in accordance with 46 CFR Part 540, Subpart A. The Escrow Account shall be held by Escrow Agent in accordance with the terms hereof, to be utilized to discharge Customer's legal liability to indemnify the passengers of the named vessel(s) for non-performance of transportation within the meaning of 46 CFR 540.2(m). The Escrow Agent shall make indemnification payments pursuant to written instructions from Customer, on which the Escrow Agent may rely, or in the event that:

(1) the passenger makes a request for refund from the Principal in accordance with the ticket contract. If, the ticket contract refund procedure provides less than 180 days, this Escrow Account shall be available after written notification to Principal.

(2) If the passenger is unable to resolve the claim within 180 days after nonperformance, as defined in 46 CFR 540.2, occurs, the passenger may submit a claim against the Escrow Account as per instructions on the Commission website. The claim must include a copy of the boarding pass, proof and amount of payment, cancellation notice, and dated proof of properly filed claim against the Principal. All documentation must clearly display the vessel and voyage with scheduled and actual date of sailing. And, The Escrow Agent shall make indemnification payments pursuant to written instructions from Customer, on which the Escrow Agent may rely, or in the event that such legal liability has not been discharged by Customer within twenty-one (21) days after any such passenger has obtained a final judgment (after appeal, if any) against Customer from a United States Federal or State Court of competent jurisdiction the Escrow Agent is authorized to pay funds out of the Escrow Account, after such twenty-one day period, in accordance with and pursuant to the terms of an appropriate order of a court of competent jurisdiction on receipt of a certified copy of such order.

(3) Valid claims must be paid within 90 days of submission to the Escrow Agent.

As further security for Customer's obligation to provide water transportation to passengers holding tickets for transportation on the passenger vessel(s) (see Exhibit A) Customer will pledge to each passenger who has made full or partial payment for future passage on the named vessel(s) an interest in the Escrow Account equal to such payment. Escrow Agent is hereby notified of and acknowledges such pledges. Customers' instructions to Escrow Agent to release funds from the Escrow Account as described in this Agreement shall constitute a certification by Customer of the release of pledge with respect to such funds due to completed, canceled or terminated cruises. Furthermore, Escrow Agent agrees to hold funds in the Escrow Account until directed by Customer or a court order to release such funds as described in this Agreement. Escrow Agent shall accept instructions only from Customer, acting on its own behalf or as agent for its passengers, and shall not have any obligations at any time to act pursuant to instructions of Customer's passengers or any other third parties except as expressly described herein. Escrow Agent hereby waives any right of offset to which it is or may become entitled with regard to the funds on deposit in the Escrow Account which constitute Unearned Passenger Revenue.

12. Customer agrees to provide to the Escrow Agent all information necessary to facilitate the administration of this Agreement and the Escrow Agent may rely upon any information so provided.

13. Customer hereby warrants and represents that it is a corporation in good standing in its State of organization and that is qualified to do business in the State of . Customer further warrants and represents that (i) it possesses full power and authority to enter into this Agreement and fulfill its obligations hereunder and (ii) that the execution, delivery and performance of this Agreement have been authorized and approved by all required corporate actions.

14. Escrow Agent hereby warrants and represents that it is a national banking association in good standing. Escrow Agent further warrants and represents that (i) it has full power and authority to enter into this Agreement and fulfill its obligations hereunder and (ii) that the execution, delivery and performance of this Agreement have been authorized and approved by all required corporate actions.

15. This Agreement shall have a term of one (1) year and shall be automatically renewed for successive one (1) year terms unless notice of intent not to renew is delivered to the other party to this Agreement and to the Commission at least 90 days prior to the expiration of the current term of this Agreement. Notice shall be given by certified mail to the parties at the addresses provided in Paragraph 25 below. Notice shall be given by certified mail to the Commission at the address specified in this Agreement.

16. (a) Customer hereby agrees to indemnify and hold harmless Escrow Agent against any and all claims, losses, damages, liabilities, cost and expenses, including litigation, arising hereunder, which might be imposed or incurred on Escrow Agent for any acts or omissions of the Escrow Agent or Customer, not caused by the negligence or willful misconduct of the Escrow Agent. The indemnification set forth herein shall survive the resignation or removal of the Escrow Agent and the termination of this agreement.

(b) In the event of any disagreement between parties which result in adverse claims with respect to funds on deposit with Escrow Agent or the threat thereof, Escrow Agent may refuse to comply with any demands on it with respect thereto as long as such disagreement shall continue and in so refusing, Escrow Agent need not make any payment and Escrow Agent shall not be or become liable in any way to Customer or any third party (whether for direct, incidental, consequential damages or otherwise) for its failure or refusal to comply with such demands and it shall be entitled to continue so to refrain from acting and so refuse to act until such conflicting or adverse demands shall finally

terminate by mutual written agreement acceptable to Escrow Agent or by a final, non-appealable order of a court of competent jurisdiction.

17. Escrow Agent shall be entitled to such compensation for its services hereunder as may be agreed upon from time to time by Escrow Agent and Customer and which shall initially be set forth in a separate letter agreement between Escrow Agent and Customer. This Agreement shall not become effective until such letter agreement has been executed by both parties hereto and confirmed in writing to the Commission.

18. Customer may terminate this Agreement and engage a successor escrow agent, after giving at least 90 days written termination notice to Escrow Agent prior to terminating Escrow Agent if such successor agent is a commercial bank whose passbook accounts are insured by the Federal Deposit Insurance Corporation and such successor agrees to the terms of this agreement, or if there is a new agreement then such termination shall not be effective until the new agreement is approved in writing by the Commission. Upon giving the written notice to Customer and the Commission, Escrow Agent may terminate any and all duties and obligations imposed on Escrow Agent by this Agreement effective as of the date specified in such notice, which date shall be at least 90 days after the date such notice is given. All escrowed funds as of the termination date specified in the notice shall be turned over to the successor escrow agent, or if no successor escrow agent has been named within 90 days after the giving of such notice, then all such escrowed funds for sailing scheduled to commence after the specified termination date shall be returned to the person who paid such passage fares upon written approval of the Commission. In the event of any such termination where the Escrow Agent shall be returning payments to the passengers, then Escrow Agent shall request from Customer a list of passenger names, addresses, deposit/fare amounts and other information needed to make refunds. On receipt of such list, Escrow Agent shall return all passage fares held in the Escrow Account as of the date of termination specified in the notice to the passengers, excepting only amounts Customer is entitled to receive pursuant to the terms of this Agreement for cruises completed through the termination date specified in the notice, and all interest which shall be paid to Customer.

In the event of termination of this Agreement and if alternative evidence of financial responsibility has been accepted by the Commission and written evidence satisfactory to Escrow Agent of the Commission's acceptance is presented to Escrow Agent, then Escrow Agent shall release to Customer all passage fares held in the Escrow Account as of the date of termination specified in the notice. In the event of any such termination where written evidence satisfactory to Escrow Agent of the Commission's acceptance has not been presented to Escrow Agent, then Escrow Agent shall request from Customer a list of passenger names, addresses, deposit/fare amounts and other information needed to make refunds. On receipt of such list, Escrow Agent shall return all passage fares held in the Escrow Account as of the date of termination specified in the notice to the passengers, excepting only amounts Customer is entitled to receive pursuant to the terms of this Agreement for cruises completed through the termination date specified in the notice, and all interest which shall be paid to Customer. Upon termination, Customer shall pay all costs and fees previously earned or incurred by Escrow Agent through the termination date.

19. Neither Customer nor Escrow Agent shall have the right to sell, pledge, hypothecate, assign, transfer or encumber funds or assets in the Escrow Account except in accordance with the terms of this Agreement.

20. This Agreement is for the benefit of the parties hereto and, accordingly, each and every provision hereof shall be enforceable by any or each or both of them. Additionally, this Agreement



shall be enforceable by the Commission. However, this Agreement shall not be enforceable by any other party, person or entity whatsoever.

21. (a) No amendments, modifications or other change in the terms of this Agreement shall be effective for any purpose whatsoever unless agreed upon in writing by Escrow Agent and Customer and approved in writing by the Commission.

(b) No party hereto may assign its rights or obligations hereunder without the prior written consent of the other, and unless approved in writing by the Commission. The merger of Customer with another entity or the transfer of a controlling interest in the stock of Customer shall constitute an assignment hereunder for which prior written approval of the Commission is required, which approval shall not be unreasonably withheld.

22. The foregoing provisions shall be binding upon undersigned, their assigns, successors and personal representative.

23. The Commission shall have the right to inspect the books and records of the Escrow Agent and those of Customer as related to the Escrow Account. In addition, the Commission shall have the right to seek copies of annual audited financial statements and other financial related information.

24. All investments, securities and assets maintained under the Escrow Agreement will be physically located in the United States.

25. Notices relating to this Agreement shall be sent to Customer at (address) and to Escrow Agent at (address) or to such other address as any party hereto may hereafter designate in writing. Any communication sent to the Commission or its successor organization shall be sent to the following address: Bureau of Certification and Licensing, Federal Maritime Commission, 800 North Capitol NW., Washington, DC 20573-0001.

26. This agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which when taken together shall constitute one and the same instrument.

27. This Agreement is made and delivered in, and shall be construed in accordance with the laws of the State \_\_\_\_ of without regard to the choice of law rules.

IN WITNESS WHEREOF, the undersigned have each caused this Agreement to be executed on their behalf as of the date first above written.

By: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Title: \_\_\_\_\_

ESCROW AGREEMENT, dated \_\_\_\_\_ by and between (Customer) and (Escrow Agent).

*Passenger Vessels Owned or Chartered*

ANNEX 1

RECOMPUTATION CERTIFICATE

To: Federal Maritime Commission

And To: ("Bank") \_\_\_\_\_

The undersigned, the Controller of \_\_\_\_\_ hereby furnishes this Recomputation Certificate pursuant to the terms of the Escrow Agreement dated \_\_\_\_\_, between the Customer and ("Bank"). Terms herein shall have the same definitions as those in such Escrow Agreement and Federal Maritime Commission regulations.

I. Unearned Passenger Revenue as of ("Date") was: \$\_\_\_\_\_

a. Additions to unearned Passenger Revenue since such date were:

1. Passenger Receipts: \$\_\_\_\_\_

2. Other (Specify) \$\_\_\_\_\_

3. Total Additions: \$\_\_\_\_\_

b. Reductions in Unearned Passenger Revenue since such date were:

1. Completed Cruises: \$\_\_\_\_\_

2. Refunds and Cancellations: \$\_\_\_\_\_

3. Other (Specify) \$\_\_\_\_\_

4. Total Reductions: \$\_\_\_\_\_

II. Unearned Passenger Revenue as of the date of this Recomputation Certificate is: \$\_\_\_\_\_

a. Excess Escrow Amount \$\_\_\_\_\_

III. Plus the Required Fixed Amount: \$\_\_\_\_\_

IV. Total Required in Escrow: \$\_\_\_\_\_

V. Current Balance in Escrow Account: \$\_\_\_\_\_

VI. Amount to be Deposited in Escrow Account: \$\_\_\_\_\_

VII. Amount of Escrow Account available to Operator: \$\_\_\_\_\_

VIII. I declare under penalty of perjury that the above information is true and correct.

Dated: \_\_\_\_\_

\_\_\_\_\_  
(Signature)

Name:

Title:

\_\_\_\_\_  
(Signature)

Name:

Title:

By the Commission.

**Rachel Dickon,**

*Secretary.*

Billing Code: 6730-02

[FR Doc. 2021-18220 Filed: 8/24/2021 8:45 am; Publication Date: 8/25/2021]